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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM, et al
Petitioners,

v.

MARTHA JOHNSON AND DELORES J. CEBALLOS, individually and on behalf of others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT

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QUESTION PRESENTED

1. Is this case ripe for review, when the Court of Appeals remanded a fee award proceeding to the district court for reconsideration?

2. Did the Court of Appeals properly remand a fee award proceeding to the district court for reconsideration under correct legal standards?

PARTIES

The original plaintiffs Martha Johnson and Delores J. Ceballos no longer have a monetary interest in the outcome of this case. The real parties in interest are the attorneys who will benefit from the award of fees: Edward Still and Susan Williams Reeves of Reeves & Still, and J. U. Blacksher and Larry T. Menefee of Blacksher, Menefee & Stein, P.A.

The individual defendants were dismissed from the case as a part of the consent decree and have no further interest in the issue of fees. The only proper defendant-petitioner is the Board of Trustees of the University of Alabama.

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STATEMENT OF THE CASE

The respondents brought an employment discrimination action under Title VII of the 1964 Civil Rights Act against the University of Alabama in Birmingham in December 1974. The Court certified a class of past and present female faculty in the School of Humanities in University College. Approximately two weeks before the case was set for trial, the parties informed the Court that an agreement had been reached and filed a joint motion for the entry of a consent decree. The Court gave notice of the proposed decree to the class, held a hearing on the fairness of the settlement, and entered the decree.

In February 1980, the respondents moved for an award of attorneys' fees and gave notice of a deposition of the petitioners to inquire into their attorneys' fees and costs. The petitioners moved to quash this subpoena and the Court did so holding that the requested information was "private and confidential information" and irrelevant under *Johnson v. Georgia Highway Express,* 488 F2d 714 (5th Cir 1974).

When the respondents moved for reconsideration, pointing out that the University was required by Alabama law to make its records available to the public, the Court reaffirmed its ruling and held, "If the information sought is available under state law, it must be sought in state court." The respondents obtained this information in a state court action and introduced it at the federal fee hearing.

The Court, on its own motion, entered an order requiring counsel for respondents to itemize all of the time they had expended, list biographical data for each attorney, and list the expenses claimed. The order also required the respondents to make available "their time records utilized to compile the summary of hours included in plaintiff's motion."

The respondents moved to modify this order by dropping the requirement of producing original time records, explaining that some of the attorneys' time records would reveal information regarding persons and cases not related to this litigation. The Court modified the prior order by allowing other clients' names to be deleted and setting a hearing for six months after the motion for fees was filed.

The respondents took no discovery, but the petitioners filed 15 pages of interrogatories relating to the respondents' attorneys' income, billing practices, similar cases, and the like. The respondents answered these interrogatories and objected to several of them on the grounds, *inter alia*, they would violate the attorney-client privilege of other clients. The petitioners moved to compel answers, and respondents moved for a protective order. The magistrate recommended that rather than having to answer the petitioners' interrogatories to which they objected, the respondents' counsel be required to submit affidavits of their usual hourly fee charges and billing practices in other cases, copies of all their time records, and a "complete justification for each item of expenses" in the instant case. The respondents' counsel filed the required material.

At the hearing on attorneys fees, the Court received several affidavits in support of each side and heard oral testimony.

Three weeks after the hearing (and 10 months after the decree on the merits), the Court ordered the petitioners to pay respondents' attorneys the sum of $50,000 as a partial payment of fees.

A year later, the Court entered its final order awarding an additional sum of $8,183.67 in fees and costs to respondents' attorneys.

REASONS FOR DENYING THE WRIT

I. This case is not yet ripe for review.

The true nature of the petitioners' position is revealed by the timing of the petition. The University is opposed to the very idea that the district court can be instructed as to correct legal principles. The Court of Appeals remanded the case for reconsideration; after the district court recomputes the fee, the petitioners may again seek review in the appellate court and this Court. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 US 327, 328 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). At this point, the district court may or may not grant a substantial modification in the fee. In any case, this case will present a more manageable, and less abstract, fact situation after the district court revises its fee award in accordance with the mandate of the Court of Appeals.

II. The Court of Appeals correctly held that a district court must substantiate its judgment as to the correct amount of attorneys' fees.

The linchpin of the petitioners' argument regarding the Court of Appeals' opinion is that the appellate court cannot require the trial court to consider — and discuss its consideration of — a uniform set of criteria. While all agree that the standard of review of fee decisions is "abuse of discretion," the petitioners apparently want that discretion unbounded by requirements that the trial court explain the computation or even the factors used. The petitioners would go even further and hold that a decision based on an erroneous understanding or application of the law cannot be corrected on appeal. A *seriatim* analysis of the points of disagreement the petitioners have with the Circuit Court's opinion will reveal the flaws in their position.

1. The district court held that respondents "were obviously successful in most of their claims" but did not achieve a "watershed" victory because few women asked for a review of their particular status after the parties had entered into an affirmative action agreement, Petition A-19. Had the district Judge not taken 6 months to set and hear the attorneys' fee issue, all of the results of class relief would not have been available to affect the fee hearing. The petitioners assert that "the Eleventh Circuit rejected these findings and substituted its own analysis," Petition 4. In fact, the Circuit Court only mentioned the respondents' "significant victory" in passing and did not instruct the trial court to change its findings, Petition A-11.

2. The petitioners would have this Court believe that the Court of Appeals has substituted its own judgment for that of the district court regarding "unnecessary duplication of effort and time due to the association of the two attorneys from Mobile," Petition 5, A-3. The Court of Appeals simply instructed the district court to reconsider its ruling taking into consideration that "a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work," and that "plaintiffs had a right to retain more than one counsel" and for some of the plaintiffs' lawyers to be from another city.[1]

3. The district court held that respondents' attorneys could not be awarded fees for the time they spent on proving their fees and replying to the petitioners' discovery relating to their past income and billings because *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714 (5th Cir 1974), did not contemplate the award of such fees and be-

[1]The district court made only a conclusory finding on this point, so review was difficult. It should be noted that plaintiffs' attorneys were matched or exceeded in number by defense counsel in all hearings except one short conference before the magistrate.

cause respondents requested an evidentiary hearing.[2] Again, the Court of Appeals instructed the district court as to points of law and remanded for reconsideration, Petition A-2.

4. The petitioners complain that the Court of Appeals "substituted its own judgment" on the matter of the bonus for contingency, Petition 7. The Court of Appeals only instructed the district court that "an award of attorney's fees should not be reduced simply because counsel is receiving some compensation from third parties," Petition A-9.[3] The Court of Appeals was only stating a principle of law, not changing the facts found by the District Court.

5. The petitioners assert that the Court of Appeals should not have reversed the exclusion of respondents' computer expenses, Petition 8. The District Court excluded the computer expenses on the grounds that respondents' attorneys had failed to produce an explanation for the claim for computer expenses, yet the record clearly shows that respondents had complied. The petitioners introduced as exhibits at the hearing copies of the respondents' computer bills they had obtained through discovery. Though each of the respondents' attorneys took the witness stand, the petitioners never asked for an explanation of the bills, which were similar to the bills submitted by the petitioners' expert (and also introduced as an exhibit at the fee hearing).

[2]The district court also found that the respondents' attorneys filed "extraneous and unnecessary" motions relating to the fee hearing, but never specified what motions it meant. The lack of such a specification hampered the respondents' ability to appeal and the appellate court's ability to review the decision for an abuse of discretion. The petitioners' appellate brief listed seven motions they claimed were frivolous. The total time spent by respondents' counsel on these motions was less than 5 hours.

[3]The compensation was only reimbursement for some expenses, not payment for the attorneys' time.

The actions of the Court of Appeals in this are similar to those of this Court in *Hensley v. Eckerhart*, ...US....., 103 SCt 1933, 76 LEd2d 40 (1983). After establishing the correct legal basis for an award of fees, this Court remanded because the district court had not properly considered those legal factors. Under the petitioners' theory, the *Hensley* opinion was deficient because it did not label the actions of the district court as an abuse of discretion and because it instructed the district court as to the correct legal analysis.[4]

III. The Court of Appeals' decision regarding delay in payment of fees is consistent with other circuits.

The Court below held (Petition A-9-10):

> The district court awarded the plaintiffs historical rates, reflecting the reasonable fee at the time the work was performed, apparently without any enhancement for delay in payment. Such delay obviously dilutes the eventual award and may convert an other-

[4]Every Circuit engages in exactly the same process (remanding with instructions as to recomputation) for which the University faults the Eleventh Circuit. *See, e.g., Furtado v. Bishop*, 635 F2d 915 (1st Cir 1980); *Cohen v. West Haven Board of Police Commissioners*, 638 F2d 496 (2d Cir 1980); *David v. City of Scranton*, 633 F2d 676 (3rd Cir 1980); *Bonnes v. Long*, 599 F2d 1316 (4th Cir 1979), cert. denied 455 US 961 (1982); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F2d 575, 581 (5th Cir 1980) ("What we require is not a meaningless exercise in parroting and answering of *Johnson's* twelve criteria, but some assurance that the court has arrived at a just compensation based on appropriate standards."), on reconsideration 701 F2d 542 (1983) (en banc); *Riddell v. National Democratic Party*, 712 F2d 165 (5th Cir 1983) (remanding because of failure to mention in fee award 115 hours claimed by prevailing parties); *Northcross v. Board of Education of Memphis City Schools*, 611 F2d 624, 640-642 (6th Cir 1979), cert. denied 447 US 911 (1980); *Mary and Crystal v. Ramsden*, 635 F2d 590, 601-2 (7th Cir 1980); *Murphy v. Ford Motor Credit Co.*, 629 F2d 556 (8th Cir 1980), *vac. & rem.* (on other grounds) 452 US 957 (1981); *Pate v. Alameda-Contra Costa Transit District*, 697 F2d 870 (9th Cir 1983); *Gurule v. Wilson*, 635 F2d 782, 792-4 (10th Cir 1980); *GAF Corp. v. Transamerica Ins. Co.*, 665 F2d 364 (DC Cir 1981).

> wise reasonable fee into an unreasonably low one. As a result, district courts should take into account inflation and interest, perhaps by adjusting the contingency factor to reflect delay, not just contingency, or perhaps by compensating at current, not historical, rates. See *Copeland v. Marshall*, 641 F2d 880, 893 (DC Cir 1980) (en banc); *Northcross v. Board of Education*, 611 F2d 624, 640 (6th Cir 1979), cert. denied, 447 US 911, 100 SCt 3000, 64 LEd2d 862 (1980). We do not prescribe any set method for correcting for delay in payment, but some form of correction must be undertaken. The district court should do so on remand. If this requires a reevaluation of the historical hourly rates, the district court is free to approach the delay problem in that manner.

The petitioners claim that this holding is inconsistent with decisions of the Sixth and District of Columbia Circuits. While those Circuits have held that adjustments for delay or inflation are discretionary, the Eleventh Circuit has recognized that a delay in payment works a significant disadvantage to attorneys working on a contingent basis. To be paid in 1981 on the basis of earlier years' rates with no adjustment for the delay in payment discourages attorneys from undertaking complex litigation. In the antitrust field, courts have recognized this fact and have awarded fees adjusted for delay in payment. See, *In re Ampicillin Antitrust Litigation*, 81 FRD 395, 402 (DDC 1978); *In re Folding Carton Antitrust Litigation*, 84 FRD 245, 267 (ND Ill 1979); *Aamco Automatic Transmissions, Inc. v. Taylor*, 82 FRD 405 (ED Pa 1979); *Knutson v. Daily Review, Inc.*, 479 FSupp 1263 (ND Cal 1979).[5]

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[5]The petitioners contend that the delay in this case was "only" four years, yet in 1981 the median time between filing and final disposition after trial of civil cases was 20 months; only ten percent of those civil cases took longer than 48 months. Administrative Office of the United States Courts, *1981 Annual Report of the Director*, Table C5. Sixteen percent of the cases over three years old on 30 June 1981 were civil rights

Because of this delay and the contingent nature of this type of case, attorneys who undertake civil rights cases are taking both a significant risk and a cut in short-term income. This risk is a proper factor to weigh in setting adequate compensation for the attorney who succeeds.

IV. The Court of Appeals properly reversed the District Court on the issue of "reconstructed time."

The district court deducted 37.06 hours from one attorney's fee request because 111 hours of her time was not contemparaneously recorded on a standard time sheet. Ms. Reeves testified that she had spent the 111 hours on pleadings and correspondence and had deliberately underestimated the time that she spent by claiming time only if there was a work product (such as correspondence or a pleading) sent out of the office. She claimed no such reconstructed time for any conferences, research, telephone calls, or the like. The petitioners admitted that Ms. Reeves had done the work and produced no evidence that the time that she claimed was unreasonable.

The district court cut the 37.06 hours without making any findings that the time was inaccurate, inflated, or fictitious, Petition A-14. The Court of Appeals held that "Reeves' testimony and secondary documentation supports her claim. The lack of contemporaneous records does not justify an automatic reduction in the hours claimed." Petition A-3. In effect, the Court of Appeals held that the district court abused its discretion by imposing a penalty without a factual basis.

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cases, while only 8.2% of the new filings during those three years were under civil rights acts. *Id.*, Tables 19 and 39. Thus it appears that civil rights cases are less likely than the average to be completed quickly.

CONCLUSION

For the reasons set out in this brief, the writ of certiorari should be denied.

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